No. 82-1154

In the Supreme Court of the United States

OCTOBER TERM, 1982

BOROUGH OF SAYREVILLE, ET AL., PETITIONERS

v.

MIDDLESEX COUNTY UTILITIES AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the requirement of Section 204(b)(1) of the Clean Water Act, 33 U.S.C. (Supp. V) 1284(b)(1), that an applicant for federal sewage treatment construction grant funds adopt a system of sewer user charges as a condition to eligibility for such funds violates the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 690 F.2d 358. The opinion of the district court (Pet. App. 24a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a-21a) was entered on October 12, 1982. The petition for a writ of certiorari was filed on January 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Clean Water Act, 33 U.S.C. (& Supp. V) 1281 *et seq.*, authorizes the Administrator of the Environmental Protection Agency to make grants of federal funds

to "any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned [waste] treatment works." 33 U.S.C. (Supp. V) 1281(g). The Administrator generally may make grants in amounts of up to 75% of the construction costs of a treatment facility if he determines that the applicant and the facility satisfy various limitations and conditions imposed by the Act. 33 U.S.C. (Supp. V) 1282(a). One such condition, found in Section 204(b)(1) of the Act, 33 U.S.C. (Supp. V) 1284(b)(1), requires any municipality that receives waste treatment services from a funded facility to adopt a system of "user charges" to pay its share of the operation, maintenance, and replacement costs of the facility.[1] The purpose of this user charge requirement is twofold: to "assur[e] that each federally assisted facility [will] have adequate operation and maintenance funds" and to "encourag[e] more efficient management of wastes discharged through a municipal system as well as an economic inducement to reduce excessive use." S. Rep. No. 95-370, 95th Cong., 1st Sess. 27 (1977). Subject to various general requirements, EPA's regulations give municipalities broad latitude in designing a user charge system. See 40 C.F.R. 35.929-1 and 35.929-2.

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[1]In relevant part, Section 204(b)(1) provides:

> Notwithstanding any other provision of this subchapter, the Administrator shall not approve any grant for any treatment works * * * unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction * * * will pay its proportionate share * * * of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant.

2. Petitioners are a New Jersey municipality (Sayreville) and the members of its borough council. In 1954, Sayreville joined 24 other municipalities and several industrial concerns in an agreement to have their sewage flows processed by a regional treatment plant operated by the Middlesex County Utilities Authority (MCUA). In 1975, MCUA applied to the EPA for a construction grant under Title II to expand its trunk system and treatment facility in order to comply with the effluent standards of the Act. As part of its application, MCUA and its members—including Sayreville—amended their 1954 agreement to specifically require each member municipality to " 'adopt a system of user charges * * * which, at a minimum, complies with the rules and regulations of the EPA' " (Pet. App. 3a). Notwithstanding this agreement, Sayreville failed to adopt a system of user charges, intending instead to rely upon its general revenues to fund its obligations to MCUA (Pet. 3). In 1980, after having advanced MCUA 80% of the promised federal funds, EPA suspended further payments on the ground that Sayreville had failed to adopt a system of user charges as required by the Clean Water Act, EPA's regulations, and the amended 1954 agreement (Pet. App. 5a-6a).[2]

3. In 1981, MCUA sued petitioners in New Jersey state court to enforce the amended 1954 agreement and compel petitioners to adopt a system of user charges for waste water treatment services. Claiming that the user charge requirements of Section 204(b)(1) were unconstitutional under the Tenth Amendment, petitioners impleaded the federal respondents,[3] who subsequently removed the action to federal

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[2]EPA regulations direct the Adminstrator to halt funding of construction projects when 80% of the grant funds are disbursed unless the Administrator has approved the applicant's system of user charges. 40 C.F.R. 35.935-13.

[3]Petitioners impleaded the Attorney General, the local United States Attorney, the Administrator of EPA, and several regional officers of EPA.

district court. In an oral opinion, the district court granted summary judgment for the federal respondents. The district court rejected petitioners' arguments that Section 204(b)(1)'s user charge requirement violated the Tenth Amendment, holding instead that the user charge requirement was a "valid exercise of legislative authority" (Pet. App. 28a) because "Congress may place reasonable conditions on award of funds" (*id.* at 27a). The district court found that the EPA construction grant program "is voluntary and States are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of Federal funding" (*ibid.*).[4]

4. The court of appeals affirmed. The court rejected petitioners' arguments that Section 204(b)(1)'s user charge requirement violated the Tenth Amendment, reasoning instead that the requirement did not " 'directly impair' " petitioners' freedom (Pet. App. 13a). "What the condition does is to state a limitation on the expenditure of federal funds—funds which, as MCUA notes in its brief, 'MCUA and its constituent municipalities were free not to apply for' " (*id.* at 13a-14a). The court of appeals also rejected petitioners' contention that Sayreville had been denied equal protection of law because, under an exception added to the Act in 1977, similarly situated municipalities that historically had used dedicated ad valorem taxes to fund their sewage treatment programs were permitted to continue using such ad valorem taxes as a basis for a user charge system. The court concluded that the Act's sanction of dedicated ad valorem taxes was a "rational limitation" that should survive an equal protection challenge because it was limited to municipalities that already had ad valorem

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[4]The district court remanded MCUA's contract claims against petitioners to the New Jersey State courts. See Pet. App. 29a-30a.

taxes in force at the time the Act was amended in 1977 and had used the ad valorem taxes for sewage charges.[5]

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or another court of appeals, and does not warrant further review.

1. Petitioners argue that Section 204(b)(1) of the Clean Water Act is unconstitutional because it impermissibly infringes upon powers of taxation reserved to the states by the Tenth Amendment (Pet. 7). However, petitioners admit—as they must—that Section 204(b)(1) does not affirmatively require any state or political subdivision to impose a users charge upon their citizens. Instead, "the Act is voluntary and the States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding." *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 11 (1981). See also *Rosado* v. *Wyman*, 397 U.S. 397, 408 (1970); *King* v. *Smith*, 392 U.S. 309, 316-317 (1968); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143 (1947). As the Court stated in *Pennhurst* (451 U.S. at 17):

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."

Having signed an amendment to the 1954 agreement with MCUA specifically requiring Sayreville to adopt a system of user charges (Pet. App. 3a), petitioners cannot claim

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[5]Petitioners do not raise their equal protection claim before this Court. See Pet. 4 n.*.

that they were not fully aware of the terms of the federal grant that MCUA received.

To be sure, petitioners now contend (Pet. 13) that they did not accept the grant or its conditions "voluntarily" because, as a practical matter, it would have been impossible for them to comply with the effluent standards of the Act without accepting federal funds. But they did not attempt in the courts below to make a record to support this argument (see Pet. App. 14a n.8), and their assertions of fiscal soundness before this Court (Pet. 3) belie their contentions. Moreover, "in other contexts the Court has recognized that valid federal enactments may have an effect on state policy—and may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority." *Federal Energy Regulatory Commission* v. *Mississippi*, No. 80-1749 (June 1, 1982), slip op. 22.

2. There is no greater merit in the contention (Pet. 5-10) that Section 204(b)(1)'s user charge requirement violates the Tenth Amendment under the rationale set forth in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Even assuming that the reasoning of *National League of Cities* applies to Congress' exercise of its spending power, the user charge requirement is not invalid.[6] In *National*

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[6]In *National League of Cities*, the Court declined to express a view "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under * * * the spending power." 426 U.S. at 852 n.17. Several lower courts have found the *National League of Cities* rationale inapplicable to cases arising under Congress' spending power. See *Texas Landowners Rights Association* v. *Harris*, 453 F. Supp. 1025, 1030 (D.D.C. 1978), aff'd, 598 F.2d 311 (D.C. Cir.), cert. denied, 444 U.S. 927 (1979); *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532, 536 n.10 (E.D.N.C.), aff'd, 435 U.S. 962 (1978). Cf. *Fullilove* v. *Klutznik*, 448 U.S. 448, 475 (1980) ("The reach of the Spending Power * * * is at least as broad as the regulatory powers of Congress.").

League of Cities, the Court held that legislation may be constitutionally suspect only if it "*directly* displace[s] the States' freedom to structure integral operations in areas of traditional government functions." 426 U.S. at 852 (emphasis added). More recently, the Court has reaffirmed that direct compulsion of the States is required before a federal regulatory scheme will be found to violate the Tenth Amendment. See *Federal Energy Regulatory Commission* v. *Mississippi, supra*, slip op. 22; *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 288 (1981); see also *United Transportation Union* v. *Long Island R.R.*, No. 80-1925, slip op. 8 (Mar. 24, 1982). Here, the court of appeals correctly found that there was no direct impairment of Sayreville's freedom to structure its integral operations, since Section 204(b)(1) is merely a condition of federal aid, which " 'MCUA and its constituent municipalities were free not to apply for' " (Pet. App. 14a).[7]

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[7]Because the user charge requirement does not directly impair the states' freedom, there is no need to address the question whether the federal interest in water pollution control would be sufficiently strong to justify the requirement under the rationale of *National League of Cities*. See *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra*, 452 U.S. at 288 n.29. However, as the court of appeals correctly recognized (Pet. App. 14a n.8), Justice Blackmun emphasized in his concurrence in *National League of Cities* that the Court's holding would not apply "in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S. at 856. Moreover, the cases cited by petitioners in support of their contention that environmental protection is not sufficiently important to salvage an otherwise unconstitutional scheme deal with attempts by EPA directly to require states to establish particular environmental programs, and not with conditions attendant to grants of federal funds. Indeed, in one case cited by petitioners, *Maryland* v. *EPA*, 530 F.2d 215, 228 (4th Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977), the court of appeals distinguished the direct regulation found in that case from cases involving conditions accompanying federal grants, concluding that the latter generally do not violate the Tenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted.

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FEBRUARY 1983

DOJ-1983-02